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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 899

JOHN M. KEARNEY, *Petitioner*,

— v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

JOHN M. KEARNEY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, John M. Kearney, prays that a writ of certiorari issue to the United States Court of Claims.

OPINIONS BELOW

The Opinion of the Court of Claims dated December 4, 1957 is reported in 156 F. Supp. 928. The Order of the Court overruling plaintiff's motion for rehearing is dated February 11, 1959.[1] Both are printed in Appendix B, *infra*.

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[1] Refere[illegible](Ex.)" are to the Exhibits filed with the Record, exce[illegible]its 1 to 3, inclusive, are three affidavits attached to the certified transcript of Record.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Navy, acting pursuant to statute through his civilian Board for the Correction of Naval Records, adopted procedures which requested and obtained three advisory opinions for use by said Board from Officers of the Naval Medical Corps as to Petitioner's incapacity for active duty for retirement purposes, two of such advisory opinions being secret, and one of them requested and received 52 days after the Hearing, does so in violation of the Fifth Amendment to the Constitution?

2. Whether the Secretary of the Navy, acting pursuant to statute through his civilian Board for the Correction of Naval Records and Officers of the Naval Medical Corps, acted arbitrarily and capriciously and contrary to the law when he determined that Petitioner was physically fit for release from active duty on October 17, 1946?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case involves:

(1) The Fifth Amendment to the Constitution of the United States printed in Appendix A, *infra*, 1a.

(2) Section 4 of the Naval Aviation Personnel Act of 1940, 54 Stat. 864, as amended, 24 U. S. C. 855(c), printed in Appendix A, *infra*, 1a.

(3) Act of June 17, 1948, c. 497, § 1(b), 62 Stat. 477, as amended, 34 U. S. C. 417, printed in Appendix A, *infra*, 1a.

(4) Section 207 of the Legislative Reorganization Act of 1946, as amended by the Act of October 25, 1951, 65 Stat. 655, 5 U. S. C. 191(a), printed in Appendix A, *infra*, 1a.

STATEMENT OF THE CASE

Succinctly stated, this case involves the denial of retirement benefits, under the most exasperating *secret* administrative procedures to Petitioner, a pilot in the Marine Corps Reserve, which are due him as a result of serious injuries sustained by him in an airplane crash during World War II. (Italics supplied)

Petitioner enlisted in the U. S. Naval Reserve on September 2, 1942. On the following February 4, 1943, he was called to active duty training as an aviation cadet and ordered to report for duty at the U. S. Navy Pre-Flight School at Saint Mary's College, California. He completed his cadet flight training and, on February 18, 1944, was commissioned a 2nd Lieutenant in the U. S. Marine Corps Reserve.

On June 13, 1945, Petitioner sustained serious injuries as a result of a plane crash while the pilot of a plane on a training flight with an aviation cadet. These injuries were as follows: (1) Fracture of the left parietal region of the skull. (2) Fracture simple, right mandible (jaw). (3) Dislocation, carpo-metacarpal joint, right wrist. Petitioner was flown from the scene of the crash, seriously injured, to the U. S. Naval Air Station, Memphis, Tennessee where he remained until August 18, 1945 on which date he was returned to flight duty at the Naval Air Station at Memphis. He immediately failed his flight physical. He was returned to the Naval Hospital where he remained until September 27, 1945 on which date he was again returned to the Naval Air Station for duty and was again promptly grounded. On December 27, 1945, Petitioner appeared before a Board of Medical Survey at the Naval Air Station. It recommended to the Bureau of Medicine and Surgery, Washington, D. C., that Petitioner be transferred to the Maxillo-Facial Center, U. S. Naval Hospital, Philadelphia, Pennsylvania for treatment. Upon the approval of this recommendation, Petitioner arrived at the

said Hospital on February 14, 1946. He was promoted to a First Lieutenant on February 16, 1946. He remained there until May 28, 1946 on which date he was given medical recuperative leave of 30 days. Upon the expiration of this leave, his orders took him to the Naval Air Station, San Diego, California, where, on September 10, 1946, he was released from active duty as physically fit, without consideration being given to his right to retired pay. On the following October 17, 1946, he was Honorably discharged from the Marine Corps Reserve.

Petitioner resigned his Reserve Commission in the Marine Corps on November 7, 1948. Soon thereafter, he applied for a Reserve Commission in the Air Force, and upon being commissioned a Captain therein, he was involuntarily called to active duty on November 22, 1948. He served in the Air Force until July 18, 1950, at which time he was given an Honorable discharge. After the airplane crash on June 13, 1945, plaintiff at no time did any solo flying. While in the Air Force, he was a Weather Officer and later an Air Intelligence Officer.

After Petitioner was Honorably discharged from the Marine Corps on October 17, 1946, the Veteran's Administration, hereafter referred to as the VA, gave him disability ratings from 40% to 70%. The latter 70% rating being dated January 18, 1952, but an earlier disability rating of 50% was made retroactive to October 1, 1948. (Ex. 32)

On July 8, 1952, Petitioner filed a Petition in the Board for Correction of Naval Records, hereinafter referred to as the BCNR, to correct his record to show that he was retired for physical disability upon his release from active duty in the Marine Corps on October 17, 1946. Admittedly, the Secretary of the Navy had the power to do so "acting through boards of civilian officers and employees", as provided in Section 207(a) of the Legislative Reorganization Act of 1946, as amended.

A long time prior to Petitioner's hearing before the BCNR which was opened and concluded on December 21, 1953 (Ex. 7), the BCNR adopted certain procedures, which were in flagrant violation of Section 207(a), as well as in defiance of well-recognized elementary rules governing all adversary proceedings. Two of these procedures were *secret* and one of them even occurred a long time *after the hearing*. In these and other respects, the actions of the Secretary of the Navy were patently arbitrary, capricious, and contrary to law. Petitioner's substantial rights were without the normal safeguards. (Italics supplied)

On June 17, 1953, the BCNR wrote the President of the Physical Disability Appeal Board (Marine Corps), for an advisory opinion as to whether or not Petitioner was incapacitated for active duty when released from active duty in the Marine Corps. It would appear to be a ground for considerable astonishment, that this Board was required to inform BCNR on July 20, 1953 that since Petitioner was released from active duty prior to the passage of the Career Compensation Act of 1949, ". . . referral of this case to the Physical Disability Appeal Board is not in accordance with the approved procedure." (Ex. 4, p. 1, para. 3)

On July 20, 1953, BCNR wrote the President, Naval Retiring Review Board (Marine Corps), for an advisory opinion as to Petitioner's fitness for active duty on October 17, 1946. On July 28, 1953, the said Board found that Petitioner was fit for duty at the time of his release from active duty. All five members of the Board were commissioned officers, three in the Marine Corps, non-medical officers, and two in the U. S. Navy, Medical Corps. (Ex. 5) Petitioner's then Counsel objected to the consideration of this advisory opinion by BCNR. The objection was noted. No attempt was made to discover whether the BCNR had seen this advisory opinion long prior to or during the hearing. The grounds of the objection were specific in

the transcript of the hearing with emphasis upon the fact that the Board consisted of all military personnel whereas Section 207(a) required that the personnel of the Board shall be civilians. (Ex. 7, p. 5) It was also urged that the Board was surly and prejudiced, and this was not without cause. (Ex. 7, p. 6)

On October 15, 1953, BCNR, apparently in need of still another advisory opinion on petitioner's fitness for active duty, made a third request upon a new authority, the Chief, Bureau of Medicine and Surgery, for such an opinion. On November 6, 1953, H. L. Pugh, Chief of such Bureau, rendered such an opinion. In the proceedings below, on Motion for a Rehearing, Petitioner's former Counsel D. le L. Jernberg, Esq., made an affidavit, dated December 1, 1958, in which he stated that "he has no recollection of having previously seen this said letter" of November 6, 1953. (Ex. 2, p. 3) Petitioner's affidavit dated December 2, 1958 stated that he saw the letter of November 6, 1953 for the first time on November 14, 1958 when present Counsel showed it to him. (Ex. 1, p. 2) We can find no reference to it in the transcript of the Hearing. As previously shown, Petitioner's former Counsel objected to the advisory opinion of the Naval Retiring Review Board, so it is unthinkable that he would not have objected to the consideration of this one if it had been made available to him either prior to or during the Hearing. This Pugh advisory opinion was the first of two secret advisory opinions. It was generally so highly prejudicial as to provide a sufficient cause for the then Counsel for Petitioner, had he seen it, to urge that Petitioner abandon his application for relief before the BCNR. This view is taken upon the premise that BCNR had seen it either before or at the Hearing, and human frailities being what they are, Petitioner could entertain no hope of a fair and impartial Hearing.

Petitioner's Hearing before the BCNR was convened and concluded on December 21, 1953. Dr. Marvin Fuchs,

Internist, Diplomate of the American Board of Internal Medicine, Instructor of Medicine at the George Washington University College of Medicine, and Associate Director of the Headache Clinic at the George Washington University Hospital, was called as a witness for Petitioner and testified as did the Petitioner. (Ex. 7, pp. 12-22) No other testimony was offered. The decision of the BCNR dated April 8, 1954 was that "no change, correction, or modification of the Naval Records of John M. Kearney . . . is warranted."

As the Hearing opened one Commander Harvey E. Reitz, Medical Corps, U. S. Navy, entered the Hearing Room and took a seat next to Mr. DeWald, Chr., BCNR. The then Counsel for Petitioner objected to Commander Reitz participating in the Hearing on the grounds that he was a Naval Officer, was disqualified from sitting on the Board since under the law it was to be composed of civilians, and that if BCNR required the assistance of Dr. Reitz that he be called as a witness. The BCNR went into executive session and when it convened announced that it had asked Dr. Reitz to be excused. (Ex. 7, pp. 3-4)

Fifty-two days *after* the Hearing, on February 11, 1954, BCNR wrote to Chief, Bureau of Medicine and Surgery, and stated therein, as follows: (Ex. 8)

> "(1) Dr. Marvin Fuchs, M.D. appeared as a witness for subject officer and testified as to the technical aspects of Petitioner's condition. It is, therefore requested that there be furnished an explanatory memorandum *which will assist the Board in evaluating the medical evidence presented.*
>
> "(2) In order that *final action may be expedited* in this case, it is requested that *your reply be furnished as soon as possible.*" (Italics supplied)

It is no mere coincidence that Petitioner was referred to Dr. Fuchs by Dr. James W. Watts, celebrated brain surgeon and Professor of Neurology at the George Washington

University Medical School, who, like Dr. Fuchs, made the same diagnosis that Petitioner was suffering from post-traumatic headaches, due to a serious head injury, which the VA had discovered was a skull fracture. (Ex. 7, p. 14) (Ex. 30, p. 17) and (Ex. 30, p. 18).

On February 24, 1954, the Chief, Bureau of Medicine and Surgery, rendered an advisory opinion to the BCNR upon the testimony of Dr. Fuchs. (Ex. 9) Dale L. Jernberg, Esq., then Counsel for Petitioner made an affidavit in support of Petitioner's motion for Rehearing in the Court below. As to this letter of February 24, 1954, he stated: (Ex. 2, p. 2)

> "that *on April 30, 1954*, he went to the Board for Correction of Naval Records to make a copy of the decision of the Board which he did in shorthand notes and placed it in plaintiff's file; that *he saw for the first time* a letter dated February 24, 1954, from the Chief, Bureau of Medicine and Surgery, to the Chairman of the Board for Correction of Naval Records; that he made a copy of said letter in shorthand notes and placed it in plaintiff's file; . . ." (Italics supplied)

On August 8, 1958, while in a conference with Petitioner, it was observed that the initials HER appeared in the upper left corner of the said advisory opinion of February 24, 1954. It was then considered possible that these initials might be the initials of Commander Harvey Reitz, who had been previously disqualified from sitting on the BCNR at the Hearing on December 21, 1953. It is interesting to note that the transcript of the Hearing (Ex. 7, pp. 3, 4) before the BCNR refers to the person Reitz *only* as Commander Harvey Reitz or Dr. Reitz, omitting any middle initial he may have had. On August 12, 1958, the Navy Department advised Counsel that the full name of Commander Reitz, who, in the meantime, had been promoted to Captain, was Harvey Edward Reitz, Medical Corps, USN. Later, on October 10, 1958, Counsel personally examined a Navy Register dated January 1,

1958. It listed Captain Harvey Edward Reitz, MC, USN, as the only medical officer of the rank of Captain with the initials HER. Further, both Mr. Jernberg and Petitioner informed Counsel that they did not know that the initials of Captain Reitz were on the letter of February 24, 1954. (Ex. 9) Petitioner in the Court below presented this as newly discovered evidence in support of his Motion for Rehearing, and Respondent below took no exceptions to any of the facts recited herein. However, this advisory opinion of February 24, 1954, as above described by Mr. Jernberg in his affidavit; was, so he states, seen by him, "on April 30, 1954 . . . for the first time." The decision of the BCNR is dated April 8, 1954 with the obvious result that the first knowledge Mr. Jernberg had of the existence of such an advisory opinion was 22 days *after* BCNR had decided Petitioner's case. (Ex 2) Unquestionably, this advisory opinion, like the advisory opinion by H. L. Pugh, dated November 6, 1953, was a secret advisory opinion. The Pugh advisory opinion disposes of the skull fracture sustained by Petitioner by omitting any reference to it and substitutes in lieu thereof the injuries of, "multiple contusions, lacerations and abrasions." (Ex. 6, p. 1) No claim has been made at any stage of the proceedings that such injuries are even compensable, much less of such substance as would entitle Petitioner to retired pay. This evasive approach to the skull fracture is beyond all of our comprehension for the reason that the opinion itself shows by "Encl (4)" that the "Veterans Administration Medical records", were before Dr. Pugh. Such medical records show that the VA took an X-ray of Petitioner's skull on July 23, 1947 (Ex. 20) and that such X-ray shows Petitioner had a skull fracture. (Ex. 21) This is the only X-ray taken of Petitioner's skull, and it is not without significance to observe that at no time or place has the Navy Medical Staff made any attempt to explain why the Navy failed to X-ray Petitioner's skull, though warned to do so by Lieutenant Biggs, who was the first medical officer

to examine Petitioner immediately following the plane crash on June 13, 1945. (Ex. 13, p. 3) However, Petitioner did not know that the above X-ray taken by the VA had shown him to have a skull fracture until after his release from the Air Force in 1950. (Ex. 7, p. 43) (Ex. 1, p. 1)

The Pugh secret advisory opinion states as to medical examination of Petitioner dated June 9, 1950 as follows: (Ex. 6, p. 3)

> "On June 9, 1950 it appears that the headaches became frequent but pertinent at this point is the fact that he was under an investigation by the U. S. Air Force for allegedly falsifying certain records, which is stress of a sufficient degree to give rise to so-called tension headaches."

But, unfortunately, the secret advisory opinion did not recite all the material parts of the report of this medical examination and the highly significant part of the omission, when considered in light of what was inserted in lieu thereof, gives rise to a belief such might have been done by deliberate design. It could not escape injuring Petitioner, a disabled veteran. It further assigned one cause of the headaches, that is "under an investigation by the U. S. Air Force for allegedly falsifying certain records," whereas the full report of the medical examination cited quite another, namely, "accident (airplane crash) in 1945." Ironically, the full report of this medical examination of June 9, 1950 appeared in Examiner Pons' brief (Ex. 30, p. 12) but it could neither be of benefit to Petitioner nor serve any useful purpose as to *what* the Pugh advisory opinion had to say about Petitioner, for the simple reason Petitioner did not know of the secret Pugh advisory opinion. In the area of pure conjecture, could either Dr. Pugh or more particularly Examiner Pons have known that, due to the aforesaid method that was adopted, Petitioner was helpless. One cannot refute something which

is kept a secret from him. The full medical examination of June 9, 1950 stated as follows: (Ex. 30, p. 12)

> "Headaches for the past several mos. getting worse. In accident in 1945 and had head injury with same type of headaches. Headaches generalized, gets nauseous with it, and at times vomited. Vision is blurred when headaches occur."

This report recited that due to headaches caused by a head injury sustained in an accident in 1945, Petitioner suffered with nausea, vomiting and blurred vision. The Pugh opinion ignoring all of these consequences gave none flowing from the headaches except stress. It also overlooked a little matter of any explanation of what caused the headaches from the time of the airplane crash on June 13, 1945, to the date of the medical report of June 9, 1950, as well as the reason the Air Force waited without taking any action, then lastly, without taking any action gave Petitioner as much as any officer, with a good record, can hope to receive, an Honorable Discharge. As to the statement that the Petitioner "was under an investigation by the U. S. Air Force for allegedly falsifying certain records," as we told the Court below, Petitioner's personnel record had been transferred from the Marine Corps to the Air Force shortly prior to the time he entered the Air Force on November 22, 1948. Nothing whatsoever was done about the inaccuracy of these records until soon after February 28, 1950. However, on February 28, 1950, about 16 months after the personnel records had gone to the Air Force, Petitioner was ordered to instruct his enlisted personnel to stop talking about some pornographic films which had been shown the previous night in the Old Hospitality Hall in the Christian Heurich Brewery in Georgetown. Plaintiff refused to do so and soon thereafter the accuracy of these personnel records was revived. Nevertheless, on July 18, 1950, the Air Force gave Petitioner an Honorable Discharge. The insertion of this material in a secret advisory medical opinion was inde-

fensible. Beyond peradventure, any experienced physician and/or Naval Officer with modest rank should know that its inclusion in the opinion was so grossly erroneous as to give some ground for one to imply bad faith. Since Petitioner was not given a physical examination at any time by any of these medical authorities, the Pugh advisory opinion went far beyond the Petitioner's medical records, none of which made any reference to his Marine Corps personnel records. The BCNR or its Examiner Pons owed Petitioner the duty of deleting it from the secret advisory opinion. Plainly, the Pugh secret advisory opinion in its reference to the report of the medical examination of June 9, 1950, changed its whole meaning by acts of commissions as well as omission. Obviously, the changed version of this report was highly prejudicial.

The Reitz advisory opinion with no showing of qualifications as an expert in the area of skull fractures, deals only with Petitioner's skull fracture. He places chief reliance upon an excerpt in a textbook which quotes from another textbook. The textbook quoted recited that the authors found that between one-third and one-half of all persons who injure their heads sufficiently to warrant hospitalization develop chronic post-traumatic headaches. They studied 63 such patients, all of whom were known to have no ". . . parenchymatous (brain) hemorrhage at the time of observation." Plainly, Petitioner's case is outside the rule of the 63 cases for Dr. Fuchs, who, unlike Dr. Reitz, had repeatedly examined him, testified that his case *did* involve a "bleeding process" (Ex. 7, p. 21) and that such had to do with the small capillaries (Ex. 7, p. 19), further describing the mild and extreme consequences of such bleeding. Both the Pugh and Reitz opinions assigned several causes for the headaches other than a fracture of the skull, and these included everything from a "sore throat" to "secondary gain." The third paragraph of the Reitz opinion misquotes Dr. Fuchs' testimony at the Hearing. (Ex. 7, p. 21) The fourth

paragraph speaks of the unlikelihood of a post-traumatic syndrome, due to organic brain changes, developing 5 or 6 years after an injury. We can find not a whit of evidence that any such position has been taken by either Dr. Fuchs or Dr. Watts.

The decision of the BCNR merely translated the fracture of the skull into the words, "or headaches", hence no disability. The decision stated: (Ex. 10, p. 4 s and t)

> "(s) That Petitioner did suffer *some limitation* of motion of his wrist and a fractured mandible with resulting malocclusion."
>
> "(t) That the evidence presented to the Board does not establish that the defects described in (s) above, *or Petitioner's headaches*, incapacitated him to perform the duties of his rank." (Italics supplied)

These advisory opinions and the decision of BCNR completely ignore the expert opinions of both Dr. Fuchs and more particularly Dr. James W Watts. (Ex. 10, p. 2, para. 5). (Ex. 30, pp. 17-18) The authors of both of these advisory opinions would have to have much, much more than is contained in them to discredit Dr. Watts. But the decision of the BCNR (Ex. 10, p. 4 q) does state that the VA on March 10, 1952, assigned Petitioner a combined disability rating of 70%, and included in the injuries mentioned are following words, "encephalapathy, traumatic, following depressed fracture, left parietal bone." But what the BCNR failed to include, and they knew it, is that the first evaluation of Petitioner's disability was 50% which included the fracture of the mandible and the dislocation of the meta-carpal bones of the right wrist and such disability of 50% was made retroactive to October 1, 1948. This was almost two months before the Air Force called Petitioner to active duty. A mere glance at his medical records would then have disclosed the above two serious injuries, and the fracture of the skull as established by the X-ray taken by the VA. In these cir-

cumstances, the Air Force would not have called him to active duty. Such is also true if Navy Medical had taken an X-ray of his skull at any time while he was in the Marine Corps.

The Pugh advisory opinion surprisingly refers to the loss of motion of the right wrist at only 10% and a "diminished grip strength," (Ex. 6, p. 2). As to the injury of the fractured right mandible, a quotation is taken from a medical examination dated May 22, 1946, as follows:

> "apparently continuation of muscle exercises is clearing up the slight residual tendency for deviation of the mandible. The malocculsion and associated discomfort no longer exists."

In light of the substance of the following three examinations, it would appear that the examination of May 22, 1946 "was superficial in the extreme." The decision of the BCNR states: (Ex. 10, p. 4 s) "That Petitioner did suffer *some* limitation of motion of his right wrist and a fractured mandible with resulting malocclusion." On February 7, 1951, Commander Dunn, MC, USN, fixed the loss of all four forms of motions of the wrist as varying from 28% to 40%, with loss of grip strength and pinch strength at 50% and 90% loss of claw strength. (Ex. 27) Earlier, on July 17, 1950, Major Webb, MC, Air Force, fixed the loss of motion of the wrist at 40%. (Ex. 25) At the request of the VA, Colonel Caldwell, MC, USA, examined Petitioner on November 22, 1950. He found that his "functional (masticatory efficiency) disability is 100% without the aid of his occlusal guide plane. With it he gains but little benefit. His facial asymmentry and disfigurement may be evaluated in approximately the same manner." (Ex. 26) All of the Naval Medical Staffs were silent as to any explanation why Petitioner was required to wear a silver splint in the mouth for 5 years when Colonel Caldwell stated that such an appliance is "a treatment appliance and is not intended for use over more than

6 months to 1 year period." Some person should have told the Navy Medical Staff that again the VA came to Petitioner's rescue, as it did in the matter of the X-ray of the skull, and provided him with a prosthesis in his mouth made of molybdenum. A Captain MacMillan, Medical Officer, Air Force, examined Petitioner at Bolling Field Hospital on March 19, 1949, and said of him: (Ex. 22, p. 2)

> "Slimly built WO (weather officer), completely coop., *understating his complaints.*" (Italics in text)

Dr. Pugh, Dr. Reitz and BCNR should have seen this one.

Petitioner's case below was decided upon Defendant's motion for Summary Judgment, Plaintiff having filed only opposition to it rather than a Cross Motion for Summary Judgment. Plaintiff's opposition contained no evidence to support it. Petitioner's Motion for Rehearing had the 35 Exhibits, which are filed herein, in support of the Motion, the Reitz secret advisory opinion being "newly discovered evidence", and the other Exhibits supporting the contention that it was a "mistake" or "inadvertence" under Rule 54(b) to have omitted all this documentary evidence.

The Court of Claims erred in overruling Petitioner's Motion for Rehearing. Such action was in conflict with the decision of the Court in *Proper* v. *United States*, 139 C. Cls. 511.

REASONS FOR GRANTING THE WRIT

This case presents highly important questions in the administration of justice as it affects the denial of rights to retirement benefits, chiefly to Reserve officers upon their release from active duty, as determined before *civilian Boards* for correction of errors or removal of injustices as have been established in the four Armed Services under the provisions of Section 207(a) of the Legislative Reorganization Act of 1946, as amended.

Petitioner's right to correct his record to show that he was retired for physical disability on October 17, 1946, was before the Secretary of the Navy, acting through his Board for the Correction of Naval Records, pursuant to Section 207(a) of the Legislative Reorganization Act of 1946, as amended. Section 207(a) provides in part:

> "The Secretaries of the Army, Navy, and the Air Force and the Secretary of the Treasury (with respect to the Coast Guard), respectively, under procedures set up by them, *and acting through boards of civilian officers, or employees* * * * are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice * * *." (Italics supplied)

While Section 207(a) authorized the Secretaries of the various Armed Services to do the acts specified therein, "correct an error or remove an injustice," these could only be done by the Secretary concerned, "acting through boards of *civilian officers, or employees* of their respective Departments." (Italics supplied) Clearly, this clear and concise language ruled out other types of personnel and the use of the descriptive language of "civilian officers or employees" was a mandate to the military personnel that they shall exercise no "*jurisdiction*" over matters coming before BCNR. More significantly, they shall have no "*authority* to determine the merits of each case." Both the "jurisdiction" and the "authority to determine" was "reserved" to such Boards. (Italics supplied) Such admonitions are confirmed in the legislative history of section 207(a). The House Report 449, 82nd Congress, 1st session, p. 3, provides:

> "The Committee takes the position that the Congress having established Boards for the Correction of Military Records within each of the service departments, *the jurisdiction of such Boards as well as the authority to determine the merits of each particular case should*

be reserved to such Boards, to the exclusion of the Comptroller General." (Italics supplied)

Petitioner contends that the Secretary of the Navy, acting through his BCNR, could not validly, under section 207(a), refer the only issue in his case, namely, his physical incapacity for active duty to officers of the Naval Medical Corps for written advisory opinions. Even if the Secretary could obtain such advisory opinions from officers of the Naval Medical Corps, then he could not do so in the manner in which he did so, that is, obtain two secret advisory opinions from the Naval Medical Officers, one of which was furnished BCNR on February 24, 1954 which was 52 days after the Hearing before BCNR on December 21, 1953. (The decision of the BCNR was dated April 8, 1954.) As emphasized heretofore, *supra*, p. 8, the existence of this advisory opinion did not come to light until April 30, 1954, which was the one of Dr. Reitz, who was the same person who was disqualified from sitting on the BCNR at the Hearing. This feature of the administrative proceeding below, when viewed particularly in the light of the text of these secret advisory opinions may be appropriately described as "administrative lawlessness," *Peters* v. *Hobby*, 349 U. S. 331, 345.

The jurisdiction of the Court below to hear and determine an officer's claim for disability retired pay, such as here presented under Section 207(a), was invoked in *Proper* v. *United States*, 139 C. Cls. 511. Defendant below did not seek certiorari. The question presented in the *Proper* case, *supra*, was in a different form than presented herein. Proper's incapacity for active duty had been *approved* by the Army Board for correction of records. Before it reached the Secretary of the Army for approval, Brigadier General E. C. McNeil, USA (Ret.) Special Assistant, Office Secretary of the Army, addressed a memorandum to the Assistant Secretary recommending denial of relief to Proper since he did not become incapacitated

until after he left the service in 1953. The Secretary adopted the recommendation. However, in the instant case, all 3 advisory opinions, two of them secret, went to BCNR for their consideration rather than going *to the Secretary after the BCNR decision.* (Italics supplied) The Court below reversed. However, the Court, in giving the one and only reason for Congress removing the military from participation in these matters, which brings out in the open the protection of fundamental rights particularly of Reserve officers, stated:

> "Since the errors or injustices which might require correction *were originally made by the military,* Congress made it manifest that the correction of those errors and injuries was to be *in the hands of civilians.*" (Italics supplied)

These secret advisory opinions rendered by military officers circumvented Section 207(a) and constituted a technique for proof of Petitioner's disability which is procedurally indefensible. As this Court said in *Jay* v. *Boyd,* 351 U. S. 345, 358, "• • • where there is no compelling reason to refuse to disclose the basis of a denial of an application [for the suspension of deportation], the statute does not contemplate arbitrary secrecy." Here no statutory interpretation of Section 207(a) could have supported the "arbitrary secrecy" of these two secret advisory opinions. In *Morgan* v. *United States,* 304 U. S. 1, 22, the Secretary of Agriculture accepted and made as his own the findings which had been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceedings to know the claims thus presented and to contest them. But this Court considered that such procedure "is more than an irregularity; it is a vital defect." Here BCNR accepted the advisory opinions and adopted the conclusions reached in each of them as its decisions of April 8, 1954, and like the instant case, the findings were kept away from the respondents. The Court

in speaking of the duties the multiplying agencies owe in our complex society stated that "they must accredit themselves by acting in accordance with cherished judicial traditions embodying the basic concepts of fair play." It was not enough that the advisory opinions were secret. Each one of the two secret advisory opinions ignored Petitioner's skull fracture and medical reports which clearly showed him to be incapacitated for active duty. There was not a whit of evidence of "fair play" in either of the two secret advisory opinions. This Court recited in great detail the essential safeguards required to assure a party of a fair trial in which his rights can be asserted or defended. *Interstate Commerce Commission* v. *Louisville & Nashville RR*, 227 U. S. 88, 93. First, all the parties must be fully apprised of the evidence submitted or to be considered. An opportunity must be given to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain his rights to make its defense. All of these accepted safeguards were lacking in the matter of these secret advisory opinions, and such were highly prejudicial to Petitioner. *St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38, 73; *United States* v. *Abilene and So. Ry. Co.*, 265 U. S. 274, 298. On the administrative proceedings below the Hearing was neither a "fair" nor an "open" one, these being "rudiments of fair play assured to every litigant by the Federal Constitution *as minimal requirements*". (Italics supplied) *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393; *Joint Anti Fascist Committee* v. *McGrath*, 341 U. S. 123, 136, 168-170; *Den ex dem Murray* v. *Hoboken Land and Improvement Co.*, 18 How 272, 280-281. Again, as here, "information [was] secretly collected and never yet disclosed," and this was done, "without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted." This was the ground for refunding previously collected rates. The

Court stated: "This is not the fair hearing essential to due process." *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 300-301; *Gonzales* v. *United States*, 348 U. S. 407, 413; *Bridges* v. *Wixon*, 326 U. S. 135, 154; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 427.

When a small part of the record of BCNR is examined, no doubt can reasonably exist but that the Reitz secret advisory opinion was substituted for the decision of BCNR on Petitioner's skull fracture or it seriously influenced BCNR in the decision it reached. On February 11, 1954, BCNR requested Bureau of Medicine and Surgery to furnish an explanatory memorandum "upon the oral testimony of Dr. Fuchs." It then admitted that such memo "will assist the Board in evaluating the medical evidence presented" (*supra*, p. 7), which the BCNR implies it must have in order to reach a decision. This appears clear when BCNR urges that the memo "be furnished as soon as possible" so that "final action may be expedited." This makes a "mockery of the law," as the Court below said in *Elchibegoff* v. *United States*, 106 C. Cls. 541, 550.

Petitioner's Medical Record

It is submitted that Petitioner's medical record and its consideration by those who examined him while on active duty is a vital part of Petitioner's cause at all of the administrative levels. Moreover, those *medical officers* and administrative officials who were called upon to examine those medical records after his release from active duty did so in a highly arbitrary and capricious manner, even to the extent of both ignoring a fracture of the skull and offering no reason for Naval Medical Staffs' failure to X-ray Petitioner's skull. It presents a typical pattern about which grave complaints were made in the Congress in 1951 and later in the Court of Claims. Nothing has been done to remedy it, at least from 1951 to 1957-1958.

Soon after the outbreak of the Korean War, Mr. Mahon was the Chairman of the Subcommittee of the House Appropriations Committee in the 81st Congress, 2nd Suppl. Approp. Bill 1951, Department of the Navy, and had before the Committee General Cates, then Commandant of the Marine Corps. The specific topic which came up was under the heading, "Reserves called with Disability Ratings." Mr. Scriviner made the following statement to General Cates as to all the Reserve Components: (p. 133)

> "Mr. Scrivner: And the kicking around that they have received has done more to break down any possible Reserve organization after this, is over than anything else under the sun. I should like to have you come up and read some of my mail, General."

Mr. Mahon then took up the matter of physical examinations given the Reserves. (p. 135)

> "General Cates: They are not ordered to active duty unless they can pass the physical examination. They must have the required physical ability. Of course, there is always a chance that a man's condition has improved since he was classified as 30-percent disabled."
>
> "Mr. Mahon: That is right, of course. That is possible. But I have heard it said that some of these men are examined by just walking through a room. It is said that there is no real physical examination. Men who have actually had the experience say that they are not examined. The Commandant of the Marine Corps should take all proper steps to see that they actually are. I realize that we are all prone to exaggeration at times, but I have heard this said so often that I have thought there must be some grain of truth in it."

The Court of Claims in the brief period from July 12, 1957, to October 8, 1958 denounced the medical examinations which had been given to three officers. In the *Prosser* case, *supra*, a very sad case comparable in another medical

area with the *Egan* case, *infra*, the Court with reference to the medical examinations said they "were hardly complete" (522) and they "were *not* thorough", (Italics by the Court) (527). Later, in *Brown* v. *United States*, No. 50362, decided October 8, 1958, the Court found that a physical examination given plaintiff, "was superficial in the extreme." C. Cls. (p. 8) In the meantime, the Court decided the case of *Egan* v. *United States*, No. 50031, decided January 15, 1958, C. Cls , 158 F. Supp. 337. Counsel here appeared for Mr. Egan. The Court referred to this case as a "case of mistaken identity and almost incredible negligence" (378), since the medical records of "*another* (Italics by the Court) John J. Egan," (381) who was insane, had been confused with the medical records of plaintiff, John J. Egan, with the result that Plaintiff Egan was confined for 5 months in various hospitals as an insane person. (380) After the discovery of this horrible mistake, Counsel sought Egan's pay as a Captain in the Marine Corps in this same BCNR. It was denied. The Court of Claims in awarding judgment found that BCNR and the Secretary of the Navy had acted "arbitrarily and illegally." (391) However, the Court found in an elaborate opinion by Judge Littleton that the true facts "could and should have been easily ascertained *by the medical* and administrative officials," and further stated: "We conclude that a more unjust and outrageous record against plaintiff could not have been compiled." (382) (Italics supplied) In the Hearing before the Naval Retiring Review Board (Marines), a Member inquired of Petitioner as to whether it was in his record that Air Force would not let him fly alone, as he had stated. Petitioner stated that, "I do not know," but added: (Ex. 5, p. 10)

> "Actually, most examinations were *given by Corpsmen.*" (Italics supplied)

In *Rex* v. *Justices of Bodmin* (1947), 1 K. B. 321, 325, a witness in a criminal case had been interrogated by the

Court in the absence of the defendant. Lord Chief Justice Goddard said:

> "It may be that they sent for this officer in the interest of the accused; it may be that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this Court has said that justice must not only be done but manifestly be seen to be done."

Petitioner respectfully submits that upon the showing made here, the case is of such nature as should call for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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